

228149

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NOV 8 2010

FINANCE DOCKET NO. 35436

**DUNCAN SMITH AND GERALD ALTIZER
CONTINUANCE-IN-CONTROL
EIGHTEEN THIRTY GROUP, LLC
AND GEORGES CREEK RAILWAY, LLC**

VERIFIED NOTICE OF EXEMPTION

ENTERED
Office of Proceedings

**MOTION TO STAY and
MOTION TO REVOKE**

NOV 8 2010

Part of
Public Record

1. Comes now James Riffin ("Riffin" or "Protestant"), who moves to stay and moves to revoke the Notice of Exemption ("NOE") that is the subject of this proceeding, and for reasons states:
2. On November 3, 2010, Riffin filed Comments. He incorporates into these Motions, by reference, those Comments, as if fully stated herein.
3. In his Comments, Riffin noted that Duncan Smith and Gerald Altizer identified themselves as the "Petitioners" in the above entitled proceeding, and asked the Surface Transportation Board ("Board") to grant them, as the **Petitioners**, an exemption from the requirements of 49 CFR 1180. Riffin further noted that in the body of their NOE, Msrs Smith and Altizer represented that Eighteen Thirty Group LLC and Georges Creek Railway LLC will be the carriers. If Eighteen Thirty Group LLC and Georges Creek Railway LLC will be the carriers, then these two legal entities should be the 'petitioners,' not Msrs. Smith and Altizer.

4. In his Comments, Riffin noted that Mssrs. Smith and Altizer **misrepresented** that the NOE met the exemption requirements specified in 49 C.F.R. §1105.7(e)(4) and (5), when pursuant to the averments made by Mssrs. Smith and Altizer in their related AB-55 (Sub No. 659X) proceeding, the NOE in fact did not meet the exemption requirements specified in 49 C.F.R. §1105.7(e)(4) and (5), to wit: Mssrs. Smith and Altizer represented that 450 to 500 railcars per year would be moved over the 8.54 mile line, which equates to 52.69 to 58.54 railcars per mile per year, which exceeds the 50 railcars per mile per year threshold of 49 C.F.R. §1105.7(e)(4)(iv), and would constitute an increase of more than 100% in the quantity of railcars moving over the Line and quantity of railcar activity in the Line's railyard.

5. In his Comments, Riffin noted that based on past activities by Mr. Altizer, Mssrs. Smith and Altizer **anticipated** acquiring the segment of the Line that connects the 8.54 mile Line with the Terminal activities of Mr. Altizer in Luke, MD., thereby connecting the two operations. Since Mssrs. Smith and Altizer have represented that the proposed continuance-in-control "is not part of a series of anticipated transactions that would connect the railroads with each other," whether Mssrs. Smith and Altizer 'anticipate' connecting the two operations is material. Consequently, proceeding via a NOE is inappropriate, since the time constraints associated with NOEs do not permit discovery on this important issue.

6. Mr. Heffner misrepresented to the Board that he can represent Mssrs. Smith and Altizer, and the Eighteen Thirty Group LLC and Georges Creek Railway LLC. As noted in Riffin's Comments, Mr. Heffner is barred by the Board's rules from representing these entities.

7. NOE's which contain material misrepresentations are void *ab initio*.

CONTROVERSIAL NOEs

8. The Board has consistently rejected NOEs when they become controversial, since the expedited time constraints associated with NOEs do not permit the development of a complete record.

9. On March 8, 2004, Riffin filed *James Riffin, dba The Northern Central Railroad* –

Acquisition and Operation Exemption – On Conrail’s Former Line Code 1224, Between the Maryland / Pennsylvania Line (MP 35.1) and Grantley (MP 56), a Distance of approximately 20.9 mile – all Lines located in York County, PA; and Between MP 14.2 (Cockeysville) and MP 16.2 (Ashland); and between MP 24.3 (Blue Mount) and MP 25.2 (Blue Mount Quarry), a distance of approximately 2.9 miles – All Lines located in Baltimore County, MD, Fin. Doc. No. 34484. On April 2, 2004, Maryland filed a Petition to Revoke this NOE, arguing that the right-of-way Riffin proposed to acquire was owned by Maryland, and Maryland would not willingly grant Riffin permission to acquire the right-of-way. Since the matter became controversial, the Board revoked this NOE on April 20, 2004.

10. On April 28, 2004, Riffin filed *James Riffin, dba The Northern Central Railroad – Acquisition and Operation Exemption – On USRA Line 145, Between the Maryland / Pennsylvania Line (MP 35.6) and Hyde (MP 54.6), a Distance of approximately 19 miles – All Line Located in York County, PA, Fin. Doc. No. 34501. The State of Maryland objected. The Board rejected this NOE on February 23, 2005, because the NOE was ‘controversial.’*

11. On February 18, 2009, Riffin filed an NOE entitled *James Riffin – Acquisition and Operation Exemption – Veneer Mfg. Co. Spur – In Baltimore County, MD, Finance Docket No. 35236. The Board rejected this NOE due to it being ‘controversial.’*

12. On March 30, 2009, Riffin filed a 3rd Amended NOE, *James Riffin – Acquisition and Operation Exemption – Veneer Mfg. Co. Spur – In Baltimore County, MD, Finance Docket No. 35236. The Board rejected this NOE due to it being ‘controversial.’*

13. In *New York Cross Harbor R.R. v. Surface Transp.*, 374 F.3d 1177, 1181(D.C. Cir. 2004), (a case Mssrs. Smith’s and Altizer’s counsel is intimately familiar with, since he argued the case before the DC Circuit), the DC Circuit vacated a decision of the Board as being arbitrary and capricious, due to the Board not following its precedents. If the Board does not reject this NOE, it will have contravened the DC Circuit’s admonition to following the Board’s precedents.

14. Mssrs. Smith and Altizer represented that they intend to acquire not only the Line of railroad, but also the real estate and track material that underlies the Line. As noted in Riffin’s

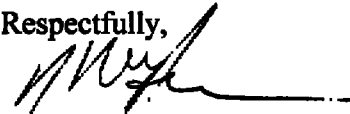
and Lowe's Comments, 96% of the underlying real estate and track material is the property of Ms. Lowe, Zandra Rudo and Eric Strohmeier, and the remaining 4% is the property of Riffin, which Riffin has exempted from his bankruptcy estate. None of these parties have consented, nor will they consent, to the transfer of the underlying real estate and track material to Mssrs. Smith and Altizer without compensation, which Mssrs. Smith and Altizer have not offered.

15. As noted in ¶9 above, in FD 34484 the Board rejected Riffin's NOE due to the State of Maryland's objections. In that proceeding, the State of Maryland only owned the underlying real estate and track material, just as Lowe, etc. do in this proceeding.

16. WHEREFORE, for the foregoing reasons, Riffin prays that the Board:

- A. Stay the NOE until the Board addresses the issues raised in these Motions; and
- B. Reject the NOE, as controversial;
- C. And for such other and further relief as would be appropriate.

Respectfully,



James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th Day of November, 2010, a copy of the foregoing Motion to Stay / Reject was mailed via first class mail, postage prepaid, to: John Heffner, Ste 200, 1750 K Street NW, Washington, DC 20006 (202) 296-3333; and was hand delivered or mailed to the U.S. Trustee, 2nd Floor, 101 W. Lombard St., Baltimore, MD 21201; to Duncan Smith, 10706 Beaver Dam Road, Cockeysville, MD 21030; and to Mark Friedman, DLA Piper, 6225 Smith Ave, Baltimore, MD 21209.



James Riffin